



**DEPARTMENT OF DEFENSE  
DEFENSE OFFICE OF HEARINGS AND APPEALS**



In the matter of:	)	
	)	
-----	)	ISCR Case No. 07-02758
SSN: -----	)	
	)	
Applicant for Security Clearance	)	

**Appearances**

For Government: Alison O’Connell, Esquire, Department Counsel  
For Applicant: *Pro Se*

April 17, 2008

**Decision**

MATCHINSKI, Elizabeth M., Administrative Judge:

Applicant submitted his security clearance application (SF 86) on September 6, 2006. On July 19, 2007, the Defense Office of Hearings and Appeals (DOHA) issued a Statement of Reasons (SOR) detailing the security concerns under Guideline J and Guideline E for Applicant. The action was taken under Executive Order 10865, *Safeguarding Classified Information within Industry* (February 20, 1960), as amended; Department of Defense Directive 5220.6, *Defense Industrial Personnel Security Clearance Review Program* (January 2, 1992), as amended (Directive), and the revised adjudicative guidelines (AG) promulgated by the President on December 29, 2005, and effective within the Department of Defense for SORs issued after September 1, 2006.

With the assistance of legal counsel, Applicant answered the SOR in writing on September 19, 2007, and requested a hearing before an administrative judge. On September 27, 2007, DOHA notified Applicant that his response was not complete. On October 9, 2007, again with the help of legal counsel, Applicant filed an amended answer to the SOR in which he reiterated his request for a hearing. Department Counsel was prepared to proceed on January 3, 2008, and the case was assigned to

me on January 30, 2008. On February 1, 2008, I scheduled a hearing for February 29, 2008.

I convened the hearing as scheduled. The government's case consisted of three exhibits (Ex. 1-3). Applicant represented himself. He and his girlfriend testified on his behalf, and he submitted 23 exhibits (Ex. A-W) that were entered without objections. A transcript (Tr.) of the hearing was received by DOHA on March 11, 2008.

The record was held open until March 21, 2008, for clarification concerning the paperwork completed in application for Applicant's security clearance. On March 18, 2008, Applicant submitted a timeline prepared by him and an adverse information report from his employer. On March 20, 2008, Department Counsel indicated she had no objections to their admission, and they were entered as exhibits X and Y, respectively. Department Counsel also conceded based on the evidence that Applicant's failure to list his arrests on his September 2006 SF 86 was unintentional. Based upon a review of the case file, pleadings, exhibits, and testimony, eligibility for access to classified information is granted.

### **Findings of Fact**

DOHA alleged under Guideline J, criminal conduct, that Applicant was arrested on July 2006 for simple assault resulting in a restraining order against him (SOR ¶ 1.a), was arrested the following day for violation of that restraining order and sentenced to 30 days in jail, suspended for one year (SOR ¶ 1.b), and was arrested and charged in September 2006 with five counts of violation of the restraining order but pleaded guilty to one count (SOR ¶ 1.c). Under Guideline E, personal conduct, Applicant was alleged to have falsified material facts on his September 2006 SF 86 by failing to disclose his arrests. Since the government now concedes the omissions were unintentional, the matters relating to Guideline E will not be discussed further and favorable findings will be entered for Applicant as to SOR ¶¶ 2.a and 2.b.

In his amended Answer, Applicant admitted the arrests that occurred during a tumultuous time in his marital relationship with his third wife, but denied he assaulted her or that he violated the restraining order. He explained that he was arrested in July 2006 for allowing a third person (his mother) to call his wife, although he did not ask or want his mother to contact her. Applicant averred he pleaded guilty to one charge of violating the restraining order in September 2006 because he went over to his ex-wife in front of the courthouse, but she had waived him over. After consideration of the evidence of record, I make the following findings of fact.

Applicant is a 49-year-old microwave assembler specialist who has worked for his present employer, a defense contractor, since late April 2002 (Ex. 1, Ex. N). He has held a security clearance since October 21, 2002 (Ex. Y, Tr. 104).

Three months into his marriage to his first wife, Applicant entered on active duty in the United States Coast Guard in about January 1979 (Ex. 1, Ex. N). He was a

steady, dependable damage controlman who exhibited pride in his work during the ten months he was aboard a Coast Guard vessel (Ex. U). In April 1983, he separated from active duty at the rank of petty officer third class and went to work in the commercial sector (Ex. 1, Ex. N).

In March 1984, he married his second wife (Ex. 1, Ex. N), and they had three children (Ex. N, Tr. 101). They divorced in November 1994 (Ex. 1). Applicant was employed during this time as a chemical technician for an analog devices company. He was a very conscientious worker who was self-motivated and responsible, including in all aspects of safety and security. He distinguished himself by his cooperative attitude and leadership style (Ex. O).

In March 2002, Applicant went to work as an airport screener. He left the job after only one month to work for his present employer (Ex. 1, Ex. N). Applicant showed little initiative or interest in his initial duties and his work performance was rated as marginal for his first eight months on the job. Over the next year, he found his expertise as a rework person and in a short period, he became an essential part of an array test team. He exhibited excellent job knowledge, teamwork, cooperation, and initiative, resulting in an overall performance rating of excellent for 2003. In 2004, Applicant expanded his skills in all aspects of the rework processes required to support the test technicians in the array test area, and his overall performance was rated as outstanding. He continued to be self-motivated in 2005, and was considered to be “a definite asset to his team, the shift, and the company.” (Ex. C).

In late January 2006, Applicant married his third wife (Ex. E, Ex. N). She had been married three times before (Ex. E). They had marital problems almost from the start, in part exacerbated by her depressive disorder (Ex. 2, Tr. 113-14). On July 29, 2006,<sup>1</sup> Applicant and his spouse had a disagreement over the computer. Around 1:00 p.m. that day, Applicant had a friend over to assess the computer problem. His spouse refused to cooperate with requests from his friend for information. After his spouse came home from work, Applicant told her he wanted a divorce, and he left the premises. He and his spouse argued when he returned later that night. Applicant called the police to calm her down. After she complained he had hit her on the leg with a telephone, Applicant was arrested for simple assault, a class A misdemeanor (Ex. 2, Ex. A, Ex. B, Tr. 109-21).<sup>2</sup> A family court judge issued an emergency order of protection on July 30, 2006, ordering Applicant to have no contact, including by third persons, with his spouse (Ex. Q).

Following his arrest, Applicant went to stay at his mother's home. Needing clothes so that he could report to work, Applicant's mother contacted his spouse on July

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<sup>1</sup>During an interview with a government investigator on January 31, 2007, Applicant indicated this incident, and his mother telephoning his spouse, occurred on July 23 and 24, 2006, respectively (Ex. 2). Court documents show the events took place over the July 29-30, 2006, time frame (Ex. A, Ex. B, Ex. G, Ex. Q).

<sup>2</sup>Applicant testified that he knew a three-day emergency protection order had been issued against him when he was released (Tr. 122). Court records indicate a protective order was issued on July 30, 2006 (Ex. Q).

30, 2006 (Ex. 2, Tr. 122). Applicant denies he asked his mother to call his spouse and that he was sleeping at the time (Tr. 123-24). His spouse got angry and contacted the police. Applicant was arrested and charged with violating a protective order, a class A misdemeanor (Ex. 2, Ex. Q). In court on July 31, 2006, Applicant pleaded nolo contendere but was found guilty and sentenced to 30 days in the house of correction, suspended for one year on good behavior, and no contact with his spouse pursuant to any pending protective order (Ex. G, Tr. 126).

On August 10, 2006, Applicant was formally charged with simple assault of his spouse on July 29, 2006 (Ex. 2, Ex. A, Ex. B). She was granted an automatic restraining order for one year (Tr. 137). He planned to file for divorce while at the courthouse. Before entering the courthouse, his spouse called him over to her vehicle. Applicant assumed she wanted to discuss the divorce so he went over. Applicant maintains that after she made derogatory statements, he went inside the courthouse as he did not want to get into trouble (Tr. 129-30). Applicant left the premises after filing for divorce (Ex. E, Tr. 130).

On or about August 31, 2006, Applicant filled out a security clearance application (Ex. N), apparently for a top secret clearance. Applicant testified that he was granted a top secret clearance but that it was not active since he did not need it for his present duties (Tr. 104-05).

On September 5, 2006, Applicant was charged with four counts of violating a protective order for going over to his spouse's car and talking to her on August 10, 2006 (Ex. H), and with a fifth count on a complaint from his spouse that he telephoned her and left a message on her answering machine on August 9, 2006 ("Oh, and then she said that I called her or something. She made a few lies, so I think they weren't able to prove them." Tr. 133) (Ex. K).

Applicant appeared in court on November 16, 2006, on the simple assault and the September 2006 violation of restraining order charges. He pleaded not guilty to the simple assault, and the charge was filed without a finding for one year (Ex. B). Under a negotiated plea, Applicant changed his plea to guilty of the restraining order violations. He was convicted and sentenced on one count for violating the order on August 10, 2006, to 30 days in the house of correction/30 days deferred on one year of good behavior (no felonies, misdemeanors or motor vehicle violations) (Tr. 133). At the end of that year, he could petition to suspend the 30-day jail sentence for one year. The remaining counts were filed without a finding (Ex. I, Ex. J, Ex. L, Ex. M). Applicant's divorce became final on October 25, 2006 (Ex. E).

Applicant notified his facility security officer of his arrests for simple assault and for violation of a restraining order. Applicant testified with no rebuttal from the government that he notified his employer within a week of his arrests (Tr. 136). On November 28, 2006, his employer submitted an adverse information report to DISCO notifying the government of Applicant's arrests in July 2006 for simple assault and violation of a restraining order (Ex. Y).

On January 31, 2007, Applicant was interviewed by a government-authorized investigator about the simple assault and violation of restraining order charges in July 2006. Applicant indicated that all charges against him had been dropped with the exception of two violations of the restraining order: for his mother calling his spouse on July 24, 2006 [sic] and for him contacting her in the parking lot on an unrecalled date (Ex. 2).

In June 2007, Applicant was asked by DOHA to update information regarding his court appearances and arrests. He indicated he had not been charged with any protective order violations since September 2006 (Ex. 3), and there is no evidence to the contrary.

The protective order against him expired in August 2007. On September 10, 2007, Applicant petitioned for return of the firearm that he had to surrender to the police under the domestic violence protective order (Ex. R). Applicant's ex-wife does not consider Applicant to be a danger to her or to others. She regrets she obtained a restraining order against him. She attributes the July 2006 incident to her being stressed out and to her medications for a major depressive disorder (Ex. D).

Applicant's personal problems with his third wife did not adversely affect his work. He achieved, and in some cases, exceeded his employer's requirements. Overall for 2006, he was considered to be a "huge asset to the [bulkhead build work] because of his even-tempered disposition and his willingness to help anyone who asks for his help." (Ex. F). He continued his good performance in 2007. He was moved into two new areas within a year's span, and accepted the challenges of his new assignments with an "excellent professional attitude." (Ex. P).

## **Policies**

When evaluating an applicant's suitability for a security clearance, the administrative judge must consider the revised adjudicative guidelines (AG). In addition to brief introductory explanations for each guideline, the adjudicative guidelines list potentially disqualifying conditions and mitigating conditions, which are useful in evaluating an applicant's eligibility for access to classified information.

These guidelines are not inflexible rules of law. Instead, recognizing the complexities of human behavior, these guidelines are applied in conjunction with the factors listed in the adjudicative process. The administrative judge's over-arching adjudicative goal is a fair, impartial and common sense decision. According to AG ¶ 2(c), the entire process is a conscientious scrutiny of a number of variables known as the "whole person concept." The administrative judge must consider all available, reliable information about the person, past and present, favorable and unfavorable, in making a decision.

The protection of the national security is the paramount consideration. AG ¶ 2(b) requires that "[a]ny doubt concerning personnel being considered for access to

classified information will be resolved in favor of national security.” In reaching this decision, I have drawn only those conclusions that are reasonable, logical and based on the evidence contained in the record. Likewise, I have avoided drawing inferences grounded on mere speculation or conjecture.

Under Directive ¶ E3.1.14, the government must present evidence to establish controverted facts alleged in the SOR. Under Directive ¶ E3.1.15, the Applicant is responsible for presenting “witnesses and other evidence to rebut, explain, extenuate, or mitigate facts admitted by Applicant or proven by Department Counsel. . . .” The Applicant has the ultimate burden of persuasion as to obtaining a favorable security decision.

A person who seeks access to classified information enters into a fiduciary relationship with the government predicated upon trust and confidence. This relationship transcends normal duty hours and endures throughout off-duty hours. The government reposes a high degree of trust and confidence in individuals to whom it grants access to classified information. Decisions include, by necessity, consideration of the possible risk the Applicant may deliberately or inadvertently fail to protect or safeguard classified information. Such decisions entail a certain degree of legally permissible extrapolation as to potential, rather than actual, risk of compromise of classified information.

Section 7 of Executive Order 10865 provides that decisions shall be “in terms of the national interest and shall in no sense be a determination as to the loyalty of the applicant concerned.” See *also* EO 12968, Section 3.1(b) (listing multiple prerequisites for access to classified or sensitive information).

## **Analysis**

### **Guideline J, Criminal Conduct**

The security concern relating to the guideline for criminal conduct is set out in AG ¶ 30: “Criminal activity creates doubt about a person’s judgment, reliability, and trustworthiness. By its very nature, it calls into question a person’s ability or willingness to comply with laws, rules and regulations.” Applicant was arrested in July 2006 for simple assault following an argument with his third wife on her complaint that he had struck her in the leg with a telephone. An emergency protective order was issued against him, and he was arrested the following day for violating that order because his mother contacted his spouse. Additional charges of violating a protective order were filed against him in September 2006, for talking to his spouse outside the courthouse in August 2006, and on a complaint by his spouse that he had called her the previous day and left a message on her answering machine. Applicant denies that he assaulted his spouse or that he knowingly violated the protective order in July 2006, although he does not contest that his mother called his spouse. He also does not contest that he spoke to his wife outside the courthouse, but avers he thought it would be okay since it was out in the open and she called him over. Applicant maintains that his spouse fabricated the telephone call in August 2006.

Available court records show Applicant pleaded nolo contendere to the July 2006 violation of the restraining order since his mother contacted his spouse. In November 2006, he entered into a negotiated plea wherein he changed his plea to guilty on all counts of violating the restraining order in return for his conviction on one count for speaking with his spouse on August 10, 2006. He continued to protest his innocence of the simple assault by pleading not guilty to that charge, and it was filed without a finding by the court. The available record does not prove Applicant assaulted his spouse in July 2006 (see AG ¶ 32(c) (“evidence that the person did not commit the offense”)), and a favorable finding is warranted as to SOR ¶ 1.a. However, the evidence establishes violation of the restraining order on two occasions, through his mother on July 30, 2006 (SOR ¶ 1.b), and on August 10, 2006 (SOR ¶ 1.c), after he had been sentenced for the July charge and ordered to have no contact with his spouse. AG ¶ 31(a) (“a single serious crime or multiple lesser offenses”) applies.

Applicant testified he is on two years of unsupervised probation for violating the protective order (Tr. 140). The lawyer who represented him at sentencing in November 2006 indicates (Ex. M), and the court record confirms (Ex. I), that Applicant was given 30 days in jail, deferred for one year, and thereafter suspended for one year on a petition. Applicant could be incarcerated for 30 days should he commit a criminal offense or even a moving violation, but a deferred sentence is not a term of probation that implicates AG ¶ 31(d) (“individual is currently on parole or probation”).

The restraining order violations are too recent to satisfy the first prong of AG ¶ 32(a) (“so much time has elapsed since the criminal behavior happened, or it happened under such unusual circumstances that it is unlikely to recur and does not cast doubt on the individual’s reliability, trustworthiness, or good judgment”), but they also occurred in the context of a new marital relationship with someone who contributed to, if not caused, the discord between them. His third wife admits she was having problems with her psychiatric medications at the time. An evaluation of the restraining order violations shows Applicant exhibited poor judgment in failing to recognize that he should not have approached his spouse outside the courthouse, but there is no evidence he intended violence against his soon-to-be ex-wife on that occasion. Although Applicant technically violated the emergency protection order through a third person in July 2006, it was not proven that he asked his mother or otherwise approved of her calling his spouse. With the termination of their marriage in October 2006, the criminal conduct is not likely to recur. There is no evidence of domestic violence concerns during Applicant’s second marriage. His performance evaluations are telling in their favorable comments about his “even-tempered disposition.” Outside of this short-term troubled relationship, Applicant has demonstrated a stable lifestyle and a good employment record free of any criminal conduct (see AG ¶ 32(d) (“there is evidence of successful rehabilitation; including but not limited to the passage of time without recurrence of criminal activity, remorse or restitution, job training or higher education, good employment record, or constructive community involvement”)). Applicant blames his ex-wife:

I would like to state that after all this was all done, and the restraining order was all done, my ex-wife at the time actually came to my house, and

showed up unannounced, and decided that she wanted me back, which I found totally insane. I just couldn't believe it myself, that this woman actually showed up and wanted me to go back with her, after everything she put me through and done to me (Tr. 148-49).

Ordinarily, a failure to exhibit sufficient remorse would raise considerable doubts for one's rehabilitation, but there is limited evidence of culpability on his part, and his ex-wife regrets she obtained a restraining order against him following a "ridiculous argument" between them when she was "very stressed out" (Ex. D).

### **Whole Person Concept**

Under the whole person concept, the Administrative Judge must evaluate an Applicant's eligibility for a security clearance by considering the totality of the Applicant's conduct and all the circumstances. The Administrative Judge should consider the nine adjudicative process factors listed at AG ¶ 2(a): "(1) the nature, extent, and seriousness of the conduct; (2) the circumstances surrounding the conduct, to include knowledgeable participation; (3) the frequency and recency of the conduct; (4) the individual's age and maturity at the time of the conduct; (5) extent to which participation is voluntary; (6) the presence or absence of rehabilitation and other permanent behavioral changes; (7) the motivation for the conduct; (8) the potential for pressure, coercion, exploitation, or duress; and (9) the likelihood of continuation or recurrence." Under AG ¶ 2(c), the ultimate determination of whether to grant eligibility for a security clearance must be an overall commonsense judgment based upon careful consideration of the guidelines and the whole person concept.

I considered the potentially disqualifying and mitigating conditions in light of all the facts and circumstances surrounding this case. Applicant's criminal conduct is relatively recent, but also minor at least with respect to the actual behavior by Applicant that led to the criminal charges. He reported the charges to his employer as required and has proven his trustworthiness and reliability on the job while holding a security clearance since 2002. On the whole, it is clearly consistent with the national interest to continue his access.

### **Formal Findings**

Formal findings for or against Applicant on the allegations set forth in the SOR, as required by section E3.1.25 of Enclosure 3 of the Directive, are:

Paragraph 1, Guideline J:	FOR APPLICANT
Subparagraph 1.a:	For Applicant
Subparagraph 1.b:	For Applicant
Subparagraph 1.c:	For Applicant

Paragraph 2, Guideline E:

FOR APPLICANT

Subparagraph 2.a:

For Applicant

Subparagraph 2.b:

For Applicant

**Conclusion**

In light of all of the circumstances presented by the record in this case, it is clearly consistent with the national interest to grant Applicant eligibility for a security clearance. Eligibility for access to classified information is granted.

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ELIZABETH M. MATCHINSKI  
Administrative Judge